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January 20, 2006

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Attention: Section 1813 ROW Study  
Office of Indian Energy and Economic Development  
1849 C Street, N.W.  
Mail Stop 2749–MIB  
Washington, D.C. 20240

**Re: Section 1813 study of energy rights-of-way on tribal land**

Dear Sir/Madam:

We represent the Pueblo of Isleta, the Mandan, Hidatsa and Arikara Nation, the Pueblo of Sandia, the Shoshone-Bannock Tribes and the Pueblo of Zia (collectively “Tribal Clients”) in connection with the study of energy rights-of-way on tribal land which the Departments of Interior and Energy (collectively the “Departments”) are conducting pursuant to Section 1813 of the Energy Policy Act of 2005.<sup>1</sup>

The purpose of this letter is to provide you with our Tribal Clients’ initial comments on the proposed workplan for the Section 1813 study.<sup>2</sup> We are also providing these comments in accordance with the consultation requirements imposed by Section 1813(a) of

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<sup>1</sup> Pub. L. No. 109-58, tit. XVIII, 119 Stat. 594, 1127-28.

<sup>2</sup> See 70 Fed. Reg. 77,178 (Dec. 29, 2005).

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Office of Indian Energy and Economic Development  
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the 2005 Act, Executive Order 13,175<sup>3</sup> and the federal trust responsibility. These comments include the input of Dr. Susan F. Tierney, Managing Principal of Analysis Group, Inc., of Boston, Massachusetts. Dr. Tierney has extensive experience in the analysis of energy issues, as shown by her resume, which is attached to this letter.

We agree with the Departments that pre-scoping discussion of issues which should be considered in the report is critical to effective consultation. Accordingly, our Tribal Clients respectfully request a pre-scoping meeting with your Departments to discuss orally the proposed workplan and the comments set forth in this letter.

## INTRODUCTION

As you know, Section 1813(b) provides as follows:

(b) REPORT: – Not later than 1 year after the date of enactment of this Act, the Secretaries shall submit to Congress a report on the findings of the study, including –

(1) an analysis of historic rates of compensation paid for energy rights-of-way on tribal land;

(2) recommendations for appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for grants, expansions, and renewals of energy rights-of-way on tribal land;

(3) an assessment of the tribal self-determination and sovereignty interests implicated by applications for the grant, expansion, or renewal of energy rights-of-way on tribal land; and

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<sup>3</sup> 65 Fed. Reg. 67,249 (Nov. 6, 2000).

(4) an analysis of relevant national energy transportation policies relating to grants, expansions, and renewals of energy rights-of-way on tribal land.<sup>4</sup>

While we treat these four study areas separately in this letter, we believe they are significantly interrelated. For example, the historic rates of compensation paid are plainly relevant to an assessment of tribal self-determination interests in energy rights-of-way. And tribal self-determination is a national energy transportation policy, as the Energy Policy Act of 2005 itself shows. *See* Part IC, *infra*. We discuss these and other interrelationships below.

We address the third and fourth study areas first because they set forth the context for the report and in our view essentially direct its only possible conclusion.

## DISCUSSION

### I. Third study area: assessment of the tribal self-determination and sovereignty interests implicated by grants, expansions and renewals of energy rights-of-way on tribal land.

Current law requires tribal consent to rights-of-way across tribal lands.<sup>5</sup> Indeed, since the earliest days of the Republic, federal law has recognized tribal ownership of and sovereign control over tribal lands. These basic principles are both supported and compelled by the federal government's trust responsibility to Indian tribes and their lands and the federal government's longstanding policy of tribal self-determination. We discuss first the fundamental rules of federal law which require tribal consent to energy rights-of-way, and then the federal government's commitment to tribal self-determination.

#### A. The legal principles which require tribal consent for the use of tribal lands are well-established and supported by the federal trust responsibility.

The authority of tribes to consent to rights-of-way and other conveyances of tribal land is embodied in and protected by the treaties and agreements with tribes which recognize

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<sup>4</sup> 119 Stat. at 1128.

<sup>5</sup> 25 U.S.C. § 324; 25 C.F.R § 169.3(a).

tribal landholdings and sovereign powers over tribal lands and by the legal fiduciary obligations of the United States to Indian property.

By these treaties and agreements, the tribes reserved their governmental authority and ownership of part of their aboriginal land base, which were in turn guaranteed to them by the United States.<sup>6</sup> The title to the reserved land, or “reservation,” was then and remains held in trust by the United States for the benefit of the Indians. The Supreme Court long ago made clear that tribal consent is required for any interference with Indian tribes’ rights to their reservation lands and that only the United States may seek that consent.<sup>7</sup> It is equally clear that the right of Indian tribes to their lands is “as sacred and as securely safeguarded as is fee simple absolute title.”<sup>8</sup> Consequently, bilateral treaties and agreements between the United States and tribes were legally necessary to accomplish the extinguishment of that title and the opening of Indian lands to non-Indian settlement. As discussed below, a trust relationship, under which the United States guaranteed the reserved lands to the tribe, was a significant part of the consideration for such bargains. Under the federal trust responsibility, it is the duty of the United States to protect the Indians’ rights to the lands they reserved.

The historic Cherokee cases were the initial source for this now well-established trust responsibility. Both of these cases involved the question whether Georgia state statutes were applicable to persons residing on lands secured to the Cherokee Nation by federal treaties. In *Cherokee Nation v. Georgia*, the Court held that it lacked original jurisdiction over a suit filed by the Nation to enjoin enforcement of the state statutes because the Nation was not a “foreign state” within the meaning of that term in Article III of the Constitution.<sup>9</sup> In *Cherokee Nation*, Chief Justice John Marshall described the Federal-Indian relationship as

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<sup>6</sup> Cf. *United States v. Winans*, 198 U.S. 371, 381 (1905) (“treaty was not a grant of rights to the Indians, but a grant of rights from them, - a reservation of those [rights] not granted”).

<sup>7</sup> *Johnson v. McIntosh*, 21 U.S. 543 (1823).

<sup>8</sup> *United States v. Shoshone Tribe of Indians*, 304 U.S. 111, 117 (1938) (citing *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 48 (1831); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 580 (1832)). These decisions remain the law today. E.g., *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 345-46 (1941); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (*Oneida II*).

<sup>9</sup> 30 U.S. at 5.

“perhaps unlike that of any other two people in existence” and “marked by peculiar and cardinal distinctions which exist no where else.”<sup>10</sup> The Court agreed with the Cherokee Nation’s contention that it was a “state” because it was “a distinct political society . . . capable of managing its own affairs and governing itself.”<sup>11</sup> The Court further held that Indian tribes had an “unquestioned right to the lands they occupy,” that Indian tribes were subject to the protection of the United States, and that rather than being “foreign states,” Indian tribes might “more correctly, perhaps, be denominated domestic dependent nations.”<sup>12</sup> Chief Justice Marshall’s opinion in *Cherokee Nation* concluded that tribes’ “relation to the United States resembles that of a ward to his guardian.”<sup>13</sup>

In the second Cherokee case, *Worcester v. Georgia*, the Court invalidated the Georgia statutes because the treaties with the Cherokees and the federal Trade and Intercourse Acts<sup>14</sup> protected tribal communities as “having territorial boundaries, within which their authority [of self-government] is exclusive.”<sup>15</sup> Chief Justice Marshall in *Worcester* meticulously analyzed the treaties with the Cherokee and emphasized that their right “to all the lands within those [territorial] boundaries . . . is not only acknowledged but guaranteed by the United States.”<sup>16</sup> The Court also analyzed the federal Trade and Intercourse Acts, which

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<sup>10</sup> *Id.* at 16.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 17.

<sup>13</sup> *Id.*

<sup>14</sup> Act of July 22, 1790, ch. 33, 1 Stat. 137, 139; Act of May 19, 1796, § 12, ch. 30, 1 Stat. 469, 472; Act of Mar. 3, 1799, § 12, ch. 46, 1 Stat. 743, 746; Act of Mar. 30, 1802, § 12, ch. 13, Stat. 139, 143. The current Trade and Intercourse Acts are codified at 25 U.S.C. § 177.

<sup>15</sup> 31 U.S. at 557.

<sup>16</sup> *Id.* Chief Justice Marshall’s decision in *Worcester* specifically rejected the claim that the Treaty of Hopewell, 7 Stat. 18 (1785), between the United States and the Cherokee Nation explicitly provided for the termination of tribal control over the internal affairs of the Cherokee Nation. Specifically, Article Nine of the Treaty provided that:

For the benefit and comfort of the Indians, and for the prevention of injuries or oppressions on the part of the citizens or Indians, the United States in Congress assembled shall have the sole and exclusive right of regulating the trade with the Indians, and

protected Indian land occupancy, as providing an additional source for the immunity of the Cherokees from state jurisdiction and, implicitly, for the trust relationship itself.

Legions of subsequent cases<sup>17</sup> have since confirmed the “undisputed existence of a general trust relationship between the United States and the Indian People.”<sup>18</sup> Modern cases have also held that this trust responsibility furnishes the standard for limiting the constitutional power of Congress over Indian tribes and their property. In *Delaware Tribal Business Committee v. Weeks*,<sup>19</sup> the Supreme Court expressly rejected an argument that there could be no judicial review of federal statutes affecting Indians, and stated instead that federal legislation affecting Indians must be “‘tied rationally to the fulfillment of Congress’

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managing all their affairs in such manner as they think proper.

*Id.* at 20.

The Court refused to interpret the words “managing all their affairs” as a complete surrender of self-government, holding that to do so would be “a perversion of their necessary meaning.” 31 U.S. at 553-54. Rather, the Court held that the Cherokee grant to the United States of authority under Article 9 was restricted solely to matters relating to trade, which the Court found was the purpose of Article Nine. The Court considered it “inconceivable that they [the Cherokee] could have supposed themselves . . . to have divested themselves of the right of self-government,” which construction would be “inconsistent with the spirit of this and of all subsequent treaties.” *Id.* at 554. Had the parties to the treaties truly intended a total surrender of the authority of self-government, “annihilating the political existence” of the tribe, the Court reasoned that “it would have been openly avowed.” *Id.*

<sup>17</sup> *E.g.*, *United States v. Kagama*, 118 U.S. 375 (1886); *Choctaw Nation v. United States*, 119 U.S. 1 (1886); *Tiger v. Western Inv. Co.*, 221 U.S. 286 (1911); *Heckman v. United States*, 224 U.S. 413 (1912); *Choate v. Trapp*, 224 U.S. 665, 675 (1912); *Lane v. Pueblo of Santa Rosa*, 249 U.S. 110 (1919); *United States v. Payne*, 264 U.S. 446 (1924); *United States v. Candelaria*, 271 U.S. 432 (1926); *United States v. Creek Nation*, 295 U.S. 103 (1935); *Shoshone Tribe of Indians v. United States*, 299 U.S. 476 (1937); *Santa Fe Pac.*, 314 U.S. at 354-56; *Tulee v. State of Wash.*, 315 U.S. 681 (1942); *Seminole Nation v. United States*, 316 U.S. 286, 296-97 (1942); *United States v. Mason*, 412 U.S. 391 (1973); *Morton v. Ruiz*, 415 U.S. 199, 236 (1974); *Morton v. Mancari*, 417 U.S. 535, 552-55 (1974); *United States v. Sioux Nation*, 448 U.S. 371, 408 (1980); *Nevada v. United States*, 463 U.S. 110, 142 (1983); *Oneida II*, 470 U.S. at 247.

<sup>18</sup> *United States v. Mitchell*, 463 U.S. 206, 225 (1983).

<sup>19</sup> 430 U.S. 73 (1977).

unique obligation toward the Indians.”<sup>20</sup> These cases thus teach that the trust responsibility operates as a limit on Congress’ power to manage Indian relations. To be valid, enactments must be tied rationally to the trust obligations.

Applying this standard, the Supreme Court has critically examined federal legislation affecting Indians to determine whether it comports with constitutional limits imposed on congressional power. As a result of that analysis, the Court has set aside those enactments which contravene the Fifth Amendment,<sup>21</sup> or has held the United States liable to pay just compensation.<sup>22</sup> In the present context, any change in the existing legal requirement that tribes must consent to rights-of-way granted over their lands would likely fail to satisfy this constitutional standard. In the alternative, tribes would have a Fifth Amendment takings claim against the United States for the value of the tribes’ right to grant or deny a right-of-way across tribal lands.

B. The longstanding federal policy of tribal self-determination also requires tribal consent for use of tribal lands.

President George W. Bush issued Presidential Proclamation 7500 on November 12, 2001, stating “we will protect and honor tribal sovereignty and help to stimulate economic development in reservation communities.”<sup>23</sup> President Bush thus reaffirmed the modern bipartisan federal Indian policy embraced by all Administrations and all Congresses – Republican and Democratic – which for nearly 40 years has consistently supported the “self-determination” of Indian tribes and communities through strengthened tribal governments and tribal economies. Earlier, President Reagan’s Message to Congress on January 24, 1983<sup>24</sup> had continued the commitment of the Nation to strong government-to-government relations with tribes and to support tribal self-government and economic self-sufficiency.

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<sup>20</sup> *Id.* at 85 (quoting its earlier decision in *Mancari*, 417 U.S. at 555).

<sup>21</sup> *See Hodel v. Irving*, 481 U.S. 704 (1987).

<sup>22</sup> *See, e.g., Sioux Nation*, 448 U.S. at 423-24; *Menominee Tribe v. United States*, 391 U.S. 404 (1968).

<sup>23</sup> 66 Fed. Reg. 57,641 (Nov. 12, 2001).

<sup>24</sup> Statement on Indian Policy, Pub. Papers 96 (Jan. 24, 1983).

President Clinton's Executive Order 13,175<sup>25</sup> similarly recognized "the right of Indian tribes to self-government" and "tribal sovereignty and self-determination," as did President George H.W. Bush's Statement Reaffirming the Government-to-Government Relationship Between the Federal Government and Indian Tribal Governments.<sup>26</sup>

The origin of this policy was President Nixon's Message to Congress on Indian Affairs in 1970,<sup>27</sup> which announced a federal Indian policy favoring tribal self-determination and rejecting federal paternalistic control of tribes, their lands and their affairs.<sup>28</sup> President Nixon's comprehensive Message expressly rejected the alternative of "excessive dependence on the Federal government" where "the Indian community is almost entirely run by outsiders who are responsible and responsive to Federal officials" rather than by tribes themselves. President Nixon stated that "[t]he time has come to break decisively with the past and to create the conditions for a new era in which the Indian future is determined by Indian acts and Indian decisions."<sup>29</sup>

The ground-breaking policy of promoting Indian self-determination had its antecedents in the Indian Reorganization Act of 1934,<sup>30</sup> which was passed to reverse the

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<sup>25</sup> *Supra* note 3, at 67,249. To the same effect, see President Clinton's Memorandum on Government-to-Government Relations With Native American Tribal Governments, 59 Fed. Reg. 22,951 (Apr. 29, 1994) and President Clinton's Executive Order on Consultation and Coordination with Indian Tribal Governments, Exec. Order No. 13,084, 63 Fed. Reg. 27,655-57 (May 14, 1998).

<sup>26</sup> Pub. Papers 662 (June 14, 1991).

<sup>27</sup> Special Message to the Congress on Indian Affairs, 213 Pub. Papers 564 (July 8, 1970).

<sup>28</sup> Two years earlier, in his Message to Congress on March 6, 1968, President Johnson had similarly "propose[d] a new goal for our Indian programs: A goal that . . . stresses self-determination; a goal that erases old attitudes of paternalism and promotes partnership self-help." Special Message to the Congress on the Problems of the American Indian: "The Forgotten American," 113 Pub. Papers 335, 336 (Mar. 6, 1968).

<sup>29</sup> Special Message to the Congress on Indian Affairs, *supra* note 27, at 565.

<sup>30</sup> ch. 576, § 1, 48 Stat. 984, *codified at* 25 U.S.C. § 461 *et seq.* ("IRA"). This statute was drafted and supported by the Roosevelt Administration. *E.g.*, S. Rep. No. 1080, 73d Cong. 2d Sess. at 3-4 (1934) (letter of Apr. 28, 1934 from President Roosevelt to Senator Wheeler, stating the "bill embodies the basic and broad principles of the administration for a new standard of



disastrous policies of previous decades. During this period, Indian people and reservation lands had been governed – essentially as colonies – by federal bureaucrats whom Indians did not elect or appoint, and who were accountable to superiors in the Executive Branch and ultimately Congress, not to the Indians. As the bill’s sponsor, Senator Wheeler, stated in the Senate debate on the Act “the Indian agent located upon an Indian reservation was [at that time] a czar.”<sup>31</sup> The results were disastrous. In the decades preceding the IRA, Indian landholdings had “shrunk to a mere 47,000,000 acres” from “137,000,000 acres of land” in the 1880s.<sup>32</sup> The IRA reversed this course, and did so by relying on the tribal consent requirement to stem the egregious losses of tribal land. A central component of the 1934 Act was the statute’s specific affirmation of tribes’ power “to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe.”<sup>33</sup>

The tribal consent requirement was again reaffirmed in the 1948 statute which authorized rights-of-way over tribal lands,<sup>34</sup> but only if tribal consent was first obtained. The consent requirement was also embodied in Interior Department regulations that were in effect both before<sup>35</sup> and after<sup>36</sup> the 1948 statute. In fact, when the Interior Department proposed in 1967 to revise the regulations to weaken the tribal consent requirement, strong opposition by the House Committee on Government Operations<sup>37</sup> and “great mistrust and apprehension on the part of Indians”<sup>38</sup> prompted the Department to withdraw that proposal. As the House

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dealing between the Federal Government and its Indian wards”).

<sup>31</sup> 78 Cong. Rec. 11,125 (1934).

<sup>32</sup> 78 Cong. Rec. 11,726 (1934) (Statement of Rep. Howard, Chairman of the House Committee on Indian Affairs).

<sup>33</sup> Section 16 of the IRA, currently 25 U.S.C. § 476(e).

<sup>34</sup> ch. 45, § 1, 62 Stat. 17, *codified at* 25 U.S.C. §§ 323-328; *see particularly* § 324.

<sup>35</sup> Felix S. Cohen, Handbook on Federal Indian Law § 9(c) and n. 204 (1942); 25 C.F.R. §§ 256.83, 256.53 (1938).

<sup>36</sup> 25 C.F.R. § 169.3; 25 C.F.R. § 169.19 (renewals); *see* 16 Fed. Reg. 8578 (1951).

<sup>37</sup> *See* H.R. Rep. No. 91-78 (1969).

<sup>38</sup> *Id.* at 17; *see also* 33 Fed. Reg. 19,803 (Dec. 27, 1968) (amending revisions to retain consent requirement in response to “strong” objections voiced in “[v]irtually all of the comments received from Indians, Indian groups, and their attorneys”).

Report noted, the consent requirement “accord[s] with one of the oldest principles of jurisprudence in America-that Indian tribes should not be deprived of their rights in their land without their consent.”<sup>39</sup>

The present-day consent requirement thus “embod[ies] into regulation the historic principle of respect for the property rights of the Indians, [and] has well stood the test of time.”<sup>40</sup> The tribal consent requirement imposed by current law has been considered several times in courts<sup>41</sup> and in administrative proceedings before the Interior Department,<sup>42</sup> and has been affirmed each time. In 1976, Congress again confirmed the importance of a uniform consent requirement by acting to repeal a 1926 law subjecting Pueblo lands to condemnation, clarifying that the consent requirement applies with equal force to Pueblo lands. The 1926 law had been enacted to facilitate one company’s right-of-way, but had the unintended effect of subjecting all Pueblo lands to broad condemnation liability. The House Report on the 1976 legislation emphasized that the consent requirement was necessary to fulfill the government’s trust obligation to “protect[] the tribes and their lands from unwanted impairment or intrusion by local interests.”<sup>43</sup> The 1926 law, the Report noted, was passed “with the intent of solving a unique problem at a precise time” and “should have been repealed after serving its specific function.”<sup>44</sup>

Tribal consent to rights-of-way over tribal lands thus remains an essential corollary of the self-determination policy as well as existing law. The alternative of having federal officials grant rights-of-way over tribal lands without tribes’ consent would retrogress federal Indian policy to the days before the Indian Reorganization Act when “the Indian agent located upon an Indian reservation was a czar” and would result in tribal decisions “almost entirely run by outsiders,” instead of “determined by Indian acts and Indian decisions,” as

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<sup>39</sup> H.R. Rep. No. 91-78, at 17.

<sup>40</sup> *Id.* at 19.

<sup>41</sup> See, e.g., *Southern Pac. Trans. Co. v. Watt*, 700 F.2d 550, 554 (9th Cir. 1983).

<sup>42</sup> See, e.g., *Transwestern Pipeline Co. v. Acting Deputy Assistant Sec’y*, 12 I.B.I.A. 49, 58 n.9 (Oct. 28, 1983); *Star Lake R.R. Co. v. Navajo Area Dir.*, 15 I.B.I.A. 220, 238-39 (Jul. 10, 1978).

<sup>43</sup> H.R. Rep. No. 94-800, at 3 (1976).

<sup>44</sup> *Id.* at 7.

President Nixon proclaimed. That would return tribes to the paternalism that has been rejected for many decades.

C. The Energy Policy Act confirms the federal commitment to tribal self-determination.

The federal commitment to tribal self-determination was reaffirmed in the Energy Policy Act of 2005, which established Indian energy programs within the Department of Interior and the Department of Energy in order to “further the goal of Indian self-determination” and “promote Indian tribal energy development.”<sup>45</sup> The Act thus incorporated tribal self-determination policy as a guiding principle, requiring agencies to act “in accordance with Federal policies promoting Indian self-determination.”<sup>46</sup>

In fact, the Energy Policy Act of 2005 significantly expanded the breadth of the tribal self-determination policy by providing for increased tribal control and decreased federal authority over all kinds of energy-related agreements on tribal lands, including energy rights-of-way. In particular, the Act authorizes tribes to enter into Tribal Energy Resources Agreements (TERAs)<sup>47</sup> with the Secretary under which the tribe essentially takes over the federal agreement approval and environmental review functions. Once a TERA is in effect, Secretarial approval is no longer required for agreements that are subject to its terms. A TERA provides a mechanism for tribes to assume much greater authority over their lands, while correspondingly reducing the federal role – thus significantly enhancing tribal self-determination. The bedrock principle on which the TERA is based is that whether to give or withhold consent for an energy right-of-way, a mineral lease or other energy-related agreement is solely a matter for the tribe to decide. The longstanding legal requirement that the Secretary of the Interior review and approve such a lease or right-of-way is rescinded by the 2005 Act for tribes adopting a TERA. The TERA provisions represent a clear choice by Congress to increase tribal control over energy development on tribal lands, a move that furthers the current policy of self-determination and the historic principle of safeguarding tribal lands, as well as the current law requiring tribal consent for energy rights-of-way.

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<sup>45</sup> Energy Policy Act of 2005, tit. V, §§ 502, 503(a), *codified at* 42 U.S.C. § 7144e, 25 U.S.C. § 3502(a)(1).

<sup>46</sup> *Id.* § 502(a).

<sup>47</sup> Energy Policy Act of 2005, tit. V, § 503, *codified at* 25 U.S.C. § 3504.

II. Fourth study area: National energy transportation policies relevant to compensation tribes receive for grants, expansions and renewals of rights-of-way over tribal lands.

The availability of utility services on Indian reservations today, as compared to the rest of the United States, is highly relevant to both the analysis of tribal self-determination and sovereignty interests implicated by energy rights-of-way and to consideration of relevant national energy transportation policies. The tribes have substantial self-determination and sovereignty interests in securing utility service on-reservation which is comparable to that available off-reservation. To the extent there is a significant difference between the two, which as we show in this Part there is, it is important to recognize that tribal consent to energy rights-of-way provides a critical means for tribes to secure improved utility service on Indian reservations. The extent to which utility service on-reservation is not on par with that available off-reservation also informs consideration of relevant national energy transportation policies under the study, because a basic purpose of these national policies is to provide for the delivery of energy resources needed by communities across the country. Where a more fundamental problem exists – namely, where a large number of reservation communities need but lack utility services – national energy transportation policies require remedying that problem first, rather than requiring underserved communities to continue to enhance the delivery of energy resources to others while their own needs are ignored.

Utility services available to Indian households on reservations lag far behind those which are taken for granted in non-reservation communities across the country. The lack of basic necessities – such as electricity, gas, telephone, water, and sewage services – in Indian households on reservations, which is particularly evident when compared to non-Indian households, is shown by myriad reports prepared by various federal government agencies. These reports, along with the 1990 and 2000 Censuses, show that Indian households on reservations are living and functioning decades behind all U.S. households in terms of the utility services that are available and used. Indian tribes should not be forced to shoulder the burden of increasing non-Indian access to utility services while their own basic service needs go unaddressed. The consent provisions contained in the current right-of-way statutes and in the Energy Policy Act insure that Indian tribes have at least some leverage to negotiate with utility companies in efforts to improve utility services on the reservations. Eliminating these consent provisions would only hinder tribes in their attempts to bring much needed utility services to the reservations.

A. Electricity

Electricity is a basic necessity needed to maintain an acceptable quality of life. Many Indian households on reservations, however, are without electricity. A Department of Energy report<sup>48</sup> found that 14.2 percent of Indian households on reservations had no access to electricity.<sup>49</sup> By comparison, only 1.4 percent of all U.S. households had no access to electricity,<sup>50</sup> a ten-fold difference. In fact, 1 in 7 on-reservation Indian households, about 16,000 in total, had no access to electricity.<sup>51</sup> Over three-quarters of these households were located on the Navajo Reservation, even though substantial generation and transmission facilities are located within the boundaries of that Reservation.<sup>52</sup> Other reservations with high levels of non-electric households include the Hopi Reservation with 28.6 percent, the Standing Rock Sioux Reservation in North and South Dakota with 18 percent, the Salt River Pima-Maricopa Indian Community with 12 percent, and the White Mountain Apache Reservation with 9 percent.<sup>53</sup>

Indian households also spend a greater proportion of their yearly income on electricity than do other U.S. households.<sup>54</sup> Because Indian households generally have lower household incomes, electricity costs are a greater burden for Indian households: ten percent of Indian households spent 20 percent of their entire income on electricity each year.<sup>55</sup> Indian households are thus either forced to live without electricity because of the lack of accessibility or to pay a greater proportion of their annual income to live with electricity in

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<sup>48</sup> U.S. Dep't of Energy, *Energy Consumption and Renewable Energy Development Potential on Indian Lands*, available at <http://www.eia.doe.gov/cneaf/solar.renewables/ilands/toc.html> (April 2000) (information contained in this report was generated using the 1990 Decennial Census of Population and Housing and Department of Energy's Energy Information Administration's 1997 Residential Energy Consumption Survey).

<sup>49</sup> *Id.* at <http://www.eia.doe.gov/cneaf/solar.renewables/ilands/execsum.html>.

<sup>50</sup> *Id.*

<sup>51</sup> *Id.* at <http://www.eia.doe.gov/cneaf/solar.renewables/ilands/chapter2.html>.

<sup>52</sup> *Id.* at <http://www.eia.doe.gov/cneaf/solar.renewables/ilands/execsum.html>.

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at <http://www.eia.doe.gov/cneaf/solar.renewables/ilands/chapter2.html>.

<sup>55</sup> *Id.*

their household. This dilemma differs greatly from the circumstances that other U.S. households enjoy.

B. Natural Gas and Other Fuels

Even greater differences exist between Indian households and U.S. households as a whole with respect to access to utility gas. A 1990 Census Statistical Brief revealed that utility gas, the leading heating fuel used nationally, was used by only 16 percent of Indian households on reservations.<sup>56</sup> The leading home heating fuel for Indian households on reservations was instead wood, which 34 percent of these households used as their primary heating fuel.<sup>57</sup> By comparison only 4 percent of all U.S. households used wood as their primary house heating fuel.<sup>58</sup> The Statistical Brief reported that the last time period when wood was used by all U.S. households as widely as it is today on Indian reservations was sometime before World War II.<sup>59</sup> To demonstrate the rarity of using wood as the primary heating fuel, the Statistical Brief further noted that in 1940 only 23 percent of all U.S. households used wood as their primary fuel, with the percentage dropping even further in 1950 to 10 percent.<sup>60</sup>

The 2000 Census also revealed that wood as a primary heating fuel in Indian households on the reservations has not changed since the 1990 Census. In fact, 28 percent of Indian households on reservations continued to use wood as their primary heating fuel while only 1.7 percent of all U.S. households used wood to heat their homes.<sup>61</sup> Instead of using utility gas to heat their homes, like 51.2 percent of the rest of the Nation did, only 17.3

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<sup>56</sup> U.S. Dep't of Commerce, Bureau of the Census, *Statistical Brief: Housing of American Indians on Reservations—Equipment and Fuels*, at 3, available at [http://www.census.gov/aprd/www/statbrief/sb95\\_11.pdf](http://www.census.gov/aprd/www/statbrief/sb95_11.pdf) (April 1995).

<sup>57</sup> *Id.* at 3.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> U.S. Bureau of the Census data for 2000 on house heating fuel available at <http://factfinder.census.gov>. (HCT 29: Tenure By House Heating Fuel – Universe: Occupied housing units).

percent of Indian households on reservations used utility gas as their primary house heating source.<sup>62</sup>

Those Indian households that used utility gas also paid a higher proportion of their annual income on gas compared to all U.S. households. According to the Department of Energy report previously referenced, “the most-burdened 10 percent of these households paid a much higher proportion of their income for these fuels in 1990 than did U.S. households as a whole or non-reservation Indian households . . . [and] 37 percent of Indian households on reservations used and paid for one or more fuels besides natural gas and electricity in 1990, a percentage that is twice as high as for U.S. households in general (18.4 percent) or for Indian households not on reservations (17.5 percent).”<sup>63</sup> Not only do Indian households on reservations fall far behind the rest of the nation in regards to accessing gas as a means for heating their homes but their incomes are also more heavily burdened by using gas to heat their homes. As with electricity, Indian households on reservations are not afforded access to utility gas in the manner enjoyed by virtually all other American households.

### C. Telephone and Internet

Telephone service, like electricity, is a basic amenity that modern U.S. households cannot live without. For Indian households on reservations, the 1990 Census showed that 53 percent of Indian households on reservations did not have a telephone in their home.<sup>64</sup> By comparison, the 1990 Census showed that only 5 percent of the rest of U.S. households were without a telephone.<sup>65</sup> While telephone subscribership on Indian reservations has increased since the 1990 Census, Indian reservation telephone subscribership still lags far behind the non-Indian community. A Federal Communications Commission report on *Telephone Subscribership on American Indian Reservations and Off-Reservation Trust Lands* shows that the 2000 Decennial Census estimated that telephone service for Indian

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<sup>62</sup> *Id.*

<sup>63</sup> U.S. Dep’t of Energy, *supra* note 48, at <http://www.eia.doe.gov/cneaf/solar.renewables/ilands/chapter2.html>.

<sup>64</sup> Bureau of the Census, *supra* note 56, at 2.

<sup>65</sup> *Id.*

households had increased to only 67.9 percent.<sup>66</sup> In contrast, 97.6 percent of all non-Indian households in the country had telephone service.<sup>67</sup>

While less of a basic necessity than telephone service, Internet service, personal computers and cable television, though readily accessible to the rest of the Nation, have made only a minimal appearance within Indian households on the reservations. In a 1999 report entitled the *Assessment of Technology Infrastructure in Native Communities*, the Economic Development Administration reported that aside from Native businesses, access to cable television, personal computers and Internet service was mainly available through schools, libraries, and health clinics.<sup>68</sup> The report further stated that 27 percent of Indian tribes did not having cellular phone service available and 21 percent of Indian tribes did not have cable television available.<sup>69</sup> The rest of the country is able to access cable television, personal computers and Internet service quite easily. This access is a necessary condition to active participation in the national and global economy, as developing countries (for example, India and China) have recognized.

#### D. Water and Sewage

Lastly, while most U.S. households take plumbing and sewage services for granted, Indian households on reservations commonly lack even these basic housing utilities. A 1990 Census Statistical Brief described the plumbing and sewage facilities on reservations as a

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<sup>66</sup> Fed. Commc'ns Comm'n: Indus., Analysis and Tech. Div., *Telephone Subscribership on American Indian Reservations and Off-Reservation Trust Lands* (released May 2003), available at [http://www.fcc.gov/Bureaus/Common\\_Carrier/Reports/FCC-State\\_Link/IAD/subsai03.pdf](http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/subsai03.pdf).

<sup>67</sup> U.S. Bureau of the Census data for 2000 on telephone service available at <http://factfinder.census.gov>. (HCT 31: Tenure By Telephone Service Available by Age of Householder – Universe: Occupied housing units).

<sup>68</sup> Dr. Linda Ann Riley et al., *Assessment of Technology Infrastructure in Native Communities*, available at <http://www.eda.gov/Research/NativeAmerican.xml> (1999) (prepared for the U.S. Dep't of Commerce: Econ. Dev. Admin.).

<sup>69</sup> *Id.* at 23.



travel back in time.<sup>70</sup> In fact, the 1990 Census discovered that Indian households were lacking complete plumbing facilities at the same rate as all U.S. households in the 1950s.<sup>71</sup> Twenty percent, or 1 in 5, Indian households on reservations lacked complete plumbing facilities in their homes.<sup>72</sup> This lack of plumbing facilities is almost unheard of in the rest of the country, with less than 1 percent of all U.S. households lacking complete plumbing facilities.<sup>73</sup> The lack of plumbing facilities continues to be an ever present problem in Indian households on the reservation in comparison to the rest of the country. The 2000 Census revealed that 13.7 percent of Indian households still lack complete plumbing facilities in their homes on the reservation.<sup>74</sup> The number of all U.S. households that lack complete plumbing facilities has dropped even further to .6 percent.<sup>75</sup> The conditions on the Hopi and Navajo Reservations exemplify the disparities between water usage on the reservation as compared to overall U.S. households.<sup>76</sup> In the State of Arizona for instance, less than 2 percent of households were lacking complete kitchens while 40 percent of households on the Navajo Reservation lacked piped water.<sup>77</sup> It is not uncommon for citizens in Hopi and Navajo communities to truck water from outside sources into their communities.<sup>78</sup> More disturbing is the fact that tribal citizens regularly trucked water from storage tanks at stock ponds to

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<sup>70</sup> See U.S. Dep't of Commerce, Bureau of the Census, *Statistical Brief: Housing of American Indians on Reservations—Plumbing*, at 1, available at [http://www.census.gov/apspd/www/statbrief/sb95\\_9.pdf](http://www.census.gov/apspd/www/statbrief/sb95_9.pdf) (April 1995).

<sup>71</sup> *Id.* at 3.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> U.S. Bureau of the Census data for 2000 on plumbing facilities available at <http://factfinder.census.gov>. (HCT 41: Tenure By Plumbing Facilities – Universe: Occupied housing units).

<sup>75</sup> *Id.*

<sup>76</sup> See Joseph P. Kalt, et al., *The Costs, Benefits, and Public Policy Merits of the Proposed Western Navajo-Hopi Lake Powell Pipeline*, 9-11 (Dec. 22, 1999) (prepared for the Hopi Tribe ).

<sup>77</sup> *Id.* at 9.

<sup>78</sup> *Id.* (these distant communities included Gallup, New Mexico, convenience stores, chapter houses, and Navajo Utility Authority facilities).

their communities to supplement their water supply, which posed serious public health concerns.<sup>79</sup>

Similar to the lack of plumbing facilities, the results for sewage facilities contrasts starkly with conditions found in U.S. households outside of the reservation. Again, the 1990 Census revealed that less than half of Indian households on reservations were connected to a public sewer.<sup>80</sup> In contrast, 76 percent of all U.S. households were connected to a public sewer.<sup>81</sup> Instead of using a public sewer, nearly 20 percent of Indian reservation households disposed of their sewage by a means other than public sewer, septic tank or cesspool.<sup>82</sup> These “other” means included such methods as outhouses, chemical toilets and facilities in another structure.<sup>83</sup> Again, the Navajo Reservation had the most severely underdeveloped water and sewage system, with 46 percent of their households using means other than public sewage services to dispose of their sewage.<sup>84</sup> In comparison, a mere 1 percent of U.S. households nationwide used other means to dispose of their sewage.<sup>85</sup> Furthermore, when tribes have been asked to assess their infrastructure in regards to water and sewage the average response of the tribes has been that the water system was at least adequate for most purposes but that the sewage system had a poor infrastructure in place that was the bare minimum.<sup>86</sup>

The statistics for water and sewage services for Indian households on reservations are no different than the results for electricity, gas, telephone, and internet services – Indian households on reservations suffer severe deficits when it comes to accessing plumbing and sewage. Put simply, Indian reservation households that are lacking complete plumbing and sewage facilities could be lacking hot and cold piped water, a flush toilet, a bathtub or

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<sup>79</sup> *Id.*

<sup>80</sup> Bureau of the Census, *supra* note 70 at 3.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*

<sup>84</sup> Riley, *supra* note 68, at 20.

<sup>85</sup> Bureau of the Census, *supra* note 70, at 3.

<sup>86</sup> Riley, *supra* note 68, at 21.

shower and a basic garbage disposal – which are not luxuries but basic necessities needed to sustain an acceptable quality of life.

III. First study area: Analysis of historic rates of compensation received by tribes for energy rights-of-way over tribal lands.

The statute requires an analysis of historic rates of compensation for energy rights-of-way on tribal land. This requirement entails at least three components. First, it requires gathering all available data on compensation rates paid tribes for all existing energy rights-of-way. Second, this data must cover “historic” as well as current rates, encompassing at least the full history of any currently used right-of-way. Third, some analysis must be performed of the data to address the other three questions set by the statute (which are interrelated with this section).

A. Existing energy rights-of-way on tribal lands.

The study should provide a complete inventory and description of all existing uses of tribal lands for energy rights-of-way and the terms on which this use occurs. It should identify all energy rights-of-way now located on tribal land, where these rights-of-way are located, the compensation and any other benefits the tribe received for granting, expanding and renewing the right-of-way, and how much tribal land is used for these rights-of-way. This inventory and description should be provided by the Department of the Interior which, under existing law, is responsible for the administration of rights-of-way on tribal land. This inventory should also identify the energy resource (e.g., electricity, gas or oil) carried on the right-of-way as well and whether the right-of-way simply crosses a tribe’s reservation or is also used to distribute energy resources to consumers on the reservation.

B. Process for obtaining energy rights-of-way on tribal lands.

The study should describe the process used to secure existing rights-of-way and how that process has changed over time. This information is needed to determine whether there is a correlation between the process used to obtain an energy right-of-way and historic rates of compensation paid for such rights-of-way.

A description of the historical and current processes for securing rights-of-way today should include the following issues:

1. How did and does the BIA process utility requests for rights-of-way?
2. How did and does the BIA determine whether the compensation to be sought is fair and appropriate?
  - For renewals or expansions of rights-of-way, how are increases in the value of the land from the time that the original right-of-way was granted (resulting, for example, from the growth of communities in the area which the right-of-way crosses) taken into account in determining what is fair and appropriate compensation?
  - Is any unfairness of the compensation previously provided to tribes by the right-of-way holder a factor in determining what compensation is due for a renewal or expansion?
  - In determining the value of tribal land for an energy right-of-way, does BIA assess the value of the land for the purpose of energy transportation?
3. How was and is the consent of the tribe obtained?
4. What risks to humans and the natural environment are presented by the transmission of electricity, natural gas, oil and other energy products across Indian reservations via energy rights-of-way?
  - What has the BIA done to identify and evaluate these risks? When and where, for example, have these risks been evaluated in Environmental Impact Statements?
  - Does the proximity of the right-of-way to Indian communities, and the waters and natural resources on which they rely, affect the analysis BIA does of appropriate compensation? If so, how is this done?

There are a number of other questions to which this examination of process should be sensitive. It is important to determine whether the process used makes clear to the energy company that it was crossing Indian lands and that the right-of-way which it was granted was for a limited term. We are aware of no indications that this did not occur, but the energy industry's professed surprise that tribal consent to the renewal or expansion of a right-of-way is required leads to an inquiry of how that came about. If there were any indications that any utility companies choosing to cross Indian reservations did not know that they would be crossing Indian lands using a right-of-way with a limited term, the study should discuss them. The inclusion of renewals and expansions in Section 1813 also leads to an inquiry as to whether the tribes had a say in where the initial right-of-way would be located on their lands.

C. Compliance with the terms of existing rights-of-way by the energy industry.

It is also important to consider whether the energy industry has complied with the terms of the rights-of-way which they now hold, particularly with regard to the compensation to be paid to the tribes, and to identify any areas of noncompliance. This is necessary so that the impacts of non-compliance on the tribes can be identified and measures can be suggested to improve the process to reduce the incidence of any such non-compliance. If companies are not complying with the terms of rights-of-way they hold, which we believe frequently to be the case, that inquiry is plainly relevant to determining the historic compensation tribes have received. The issues that should be considered include the following:

1. Payment of compensation. Has the compensation due to Indian tribes under the terms of energy rights-of-way been timely paid? If not, what has been the extent of any non-compliance with payment terms? Has the BIA ever cancelled a right-of-way for non-payment?
2. Uses of tribal lands outside the right-of-way granted. The study should identify and examine all instances where energy companies have used tribal lands outside the boundaries of a right-of-way grant.
3. Use of Indian lands by other entities not consented to by a tribe. The study should identify all instances where energy right-of-way holders purported to authorize another entity, such as a telecommunications provider, to use the right-of-way without seeking the consent of the tribe, and describe what the BIA has done in these instances.

4. Expiration of rights-of-way. What process does the BIA use to identify and address rights-of-way which are about to expire? How many of the energy rights-of-way which now cross Indian lands have expired without renewal or extension? What does the BIA do when a right-of-way has expired, but continues to be used by the former holder?

5. Evictions. How many actions have been brought by the BIA seeking to evict utilities whose rights-of-way have expired without renewal or extension? How many companies have been required by the BIA to remove pipelines or other energy conduits from Indian lands? Under current law, does the BIA treat the tribe as owning the improvements located on the right-of-way when the term of the right-of-way expires?

D. Specific comments on the workplan for this portion of the study.

We question the evident predisposition in the Departments' December 15 letter to contract for "an analysis of historical rates of compensation for pipelines crossing Indian land" using a case study approach.

First, we question whether the data should be confined to pipelines. We understand from conversations with the Department of Energy that the study will not be so limited, but we ask that you confirm this.

Second, we question why contracting this part of the study is appropriate or necessary. The Interior Department should have in its possession the basic information about all energy rights-of-way over tribal lands and the rates of compensation. If it does not, that would be a serious breach of the Department's statutory and fiduciary duties. No contractor should be needed to develop this basic information. All the information in BIA's files should be examined (in a manner that fully protects confidential and proprietary information – perhaps by aggregating some information or disguising the tribes and companies involved – but also ensures its accuracy). If a contractor is selected, it should have demonstrated experience in Indian law, policy and administration.

Third, we do not believe a "case study approach" is appropriate rather than a comprehensive gathering and analysis of all available data on existing rights-of-way. We do not believe, for example, that the Departments (or a contractor if one is chosen) can assure that the case studies would be accurate representatives of all rights-of-way – in terms of the many regions in which tribal lands are located, the varied types and terms of rights-of-way

and the various historic periods that should be studied. In addition, we do not believe a case study approach can adequately compare tribal rates of compensation with all other relevant benchmarks or accurately account for and compare all other relevant economic variables – such as the market price for gas or electricity at the time each right-of-way was granted and expected future economic conditions over the term of the right-of-way.

Section 1813 specifically requires analysis of historic, not just current, rates of compensation. Since we think it is very likely that tribes were historically greatly underpaid for the value of using tribal lands for energy and other purposes, this should be studied carefully and comprehensively. Data should be gathered as far back as possible, including the entire history of compensation paid for all existing energy rights-of-way on tribal lands.

The report may compare tribal compensation to that received by other entities. Tribes, of course, are governments. Thus, one relevant point of comparison might be the use of lands of other governments for transportation of energy from points outside the government's jurisdiction to other points outside the government's jurisdiction. For example, the study might analyze the rates of compensation (plus taxes and other benefits) provided States, now and historically, for their lands, determine whether the consent of the State is required for these rights-of-way, and identify all instances where it has ever been withheld. The study could also examine the compensation and other benefits provided to foreign countries traversed by international pipelines, such as the contemplated transmission of Arctic gas from Alaska through Canada to the Midwest. And it could analyze whether the rates of compensation have varied depending on whether these governments receive some of the energy for their citizens, or are just passive conduits for transporting the energy product elsewhere.

When a government's lands are crossed by energy rights-of-way, the government typically depends on the exercise of the tax power to insure that the holders of the right-of-way meet their responsibilities to contribute to the costs of governance and the delivery of programs and services to persons and entities living and doing business within the government's territory. Similarly, governments typically depend on the exercise of some regulatory jurisdiction over the right-of-way holder to protect the health and welfare of the communities through which the right-of-way crosses from the impacts, externalities and risks of the transportation on the right-of-way of energy resources.

However, for tribes, the rules which recent court decisions have applied to determine the extent of tribal jurisdiction over non-Indian activity on rights-of-way make these typical outcomes far less certain. Accordingly, an assessment of the extent to which the holders of energy rights-of-way are actually subject to tribal tax and regulatory jurisdiction is important to the study of tribal right-of-way compensation. We suggest that utilities which do not pay tribal taxes may fairly be asked to provide additional forms of compensation in order to obtain the tribe's agreement to a right-of-way, because a larger payment for the right-of-way sufficient to include the costs of governance and service delivery and the risks posed by the right-of-way to the tribal community can reasonably be sought. The same is true with respect to tribal laws which protect tribal health, safety and welfare. If, as we think likely, applicants for rights-of-way generally do not agree to be bound by such tribal laws as a condition of the right-of-way, additional compensation would be appropriate for tribes to cover the costs of providing these protections. Accordingly, an assessment of the extent to which these laws now apply to holders of rights-of-way is important. The following questions should therefore be considered in the study:

1. The extent to which companies holding energy rights-of-way located on Indian lands now pay taxes and/or other benefits and contributions to Indian tribes?
2. Whether these companies holding energy rights-of-way located on Indian reservations are now instead taxed by and/or provide other benefits and contributions to other nontribal governments with respect to their activities located on tribal lands and what services those other governments provide to the energy companies with respect to the tribal lands?
3. Whether these energy companies comply with tribal regulations, such as Tribal Employment Rights Ordinances, with respect to their activities located on tribal lands?
4. Whether these energy companies comply with tribal laws which protect persons, property and the environment on the reservation and whether they submit to tribal adjudicatory jurisdiction to enforce those laws?

The compensation tribes receive for rights-of-way might also be compared to the compensation received by other owners of large compact and contiguous blocks of land that



can provide a transportation corridor. And the compensation received by tribes per acre of land could be compared to that received by landowners in more urban, congested areas.

We think it is very likely that at least this part of the study cannot realistically be completed in the time set by Section 1813. If that is so, we strongly urge the Departments to seek an extension of time from Congress for completion of the study it has mandated. The alternative, we suggest, is virtually certain to be an inadequate study from which no useful conclusions or recommendations can appropriately be drawn.

IV. Second study area: Recommendations for appropriate standards and procedures for determining fair and appropriate compensation to Indian tribes for right-of-way grants, expansions and renewals over tribal lands.

The current procedure for determining compensation for tribal rights-of-way is through bilateral negotiations between the tribe and an energy company, with the Secretary's review as trustee to ensure that the tribe does not receive less than fair value. The standard for compensation is thus market-based as determined by this bilateral bargaining, subject to the protection of the Secretary's review. The market-based standard and bilateral bargaining process apply equally to grants, expansions and renewals of tribal rights-of-way. As discussed in Part I, this process is compelled by both established law and longstanding policy.

A. Specific concerns raised by energy companies.

We think it would be helpful to discuss and share with tribes early in the process any concerns about energy rights-of-way on tribal land that have been raised with your Departments by the energy industry and any other entities. This is important because to the best of our knowledge the actual results of right-of-way negotiations between Indian tribes and energy companies show that they have consistently reached agreement on the terms for rights-of-way across tribal lands through bilateral negotiations. We know, for example, of no instance where an energy product has not been supplied to consumers as a result of unsuccessful negotiations. Nor are we aware of situations where compensation paid to a tribe for grant or renewal of an energy right-of-way has demonstrably resulted in an increase in prices to the ultimate consumers of an energy product. We would like to be provided with any information any energy company has submitted to your Departments regarding the impact on consumer energy prices in any market associated with incremental compensation

paid to tribes to cross tribal lands. Accordingly, if any energy company has claimed to your Departments that these or any other problems exist with regard to a specific energy right-of-way on tribal land, we think these matters should be one of the first items for discussion with tribes at any early stage of the study's development.

To be sure, we expect there may be generalized complaints or unsupported assertions by energy companies that compensating tribes may raise energy prices for end users, but we do not believe that this has been or can be shown to have actually occurred. We also are aware of instances in which energy companies have expressed dissatisfaction with tribal negotiating positions while negotiations were ongoing. But this might well be said by either party to almost any negotiation. Certainly Indian tribes are in a position to make similar protestations about the positions of energy companies in such negotiations. But general claims and statements of this kind do not establish the existence of problems which merit consideration. Nor are we aware of such problems.

The second reason for our urging discussions of such matters as early in the process as possible is so tribes can respond to all concerns about energy rights-of-way on tribal lands which are raised. We assume that comments submitted by the energy industry with respect to the workplan and thereafter will shed light on this question. To address this, we think it would be helpful to revisit this question as and when your Departments receive relevant submissions from the energy industry.

Accordingly, we suggest that at our pre-scoping meeting, we discuss first any concerns about rights-of-way on tribal land that have already been raised with your Departments by the energy industry. We also wish to know whether your Departments are aware of any specific instances in which the renewal or expansion of an energy right-of-way was the subject of negotiations between the tribe and the energy company, but no agreement was reached. If so, when and where did this occur? Did use of the right-of-way cease upon its expiration in such instances, and if not, what is the status of the use of the right-of-way at present? Did any energy product fail to reach any consumers as a result of the breakdown in negotiations?

B. Evaluation of market power.

A principal way to consider the question of fairness and appropriateness of compensation would be to evaluate whether one party to the bilateral bargaining has exerted

undue leverage or market power that has created a serious public disadvantage. The study should, for example, evaluate all instances in which energy companies have historically or in recent times utilized financial, political or other resources to take advantage of tribes, resulting in inadequate or unfair payments of compensation. It should also determine whether there are any instances where a failure in bilateral bargaining has resulted in an energy resource not being delivered to any consumer, and if so, how long the non-delivery persisted. As noted, we do not believe this has actually occurred.

The study should also evaluate the relationship tribal compensation bears to total energy transportation costs and the total costs for any particular products (e.g., natural gas) in particular markets (e.g., Los Angeles) and determine whether there are instances where right-of-way compensation paid to a tribe demonstrably increased the price of any energy product to consumers, taking into account both delivery and commodity costs of the energy service paid by consumers. (In light of the market-based pricing of most oil and gas and most wholesale electricity sales, we believe the relevant energy prices to consumers are delivered energy prices in different regional markets. It would not be particularly informative, by contrast, to focus on the impact of incremental tribal compensation on delivery tariffs alone.) If any such instances of delivered price increases can be identified, the study should determine how large the increase was and how long it persisted, and it should compare the increase in delivered prices of the energy product due to increased compensation provided to tribes to the magnitude of the overall increase in the delivered prices for the energy product over the relevant time period.

These factors set forth above should be analyzed in different regional areas, and for different kinds of transactions – separately for grants, expansions and renewals of rights-of-way, and separately for transactions where an energy product is transported entirely over a tribal reservation as contrasted with transactions where the energy product is partly or entirely supplied to the reservation. If, as we believe, there is in fact little or no demonstrable correlation between tribal compensation and the delivered price charged the end consumer of any energy consumed in any market, there would seem to be no basis for altering the bilateral bargaining process.

As discussed in Part II, it is also important to consider the extent to which the holders of energy rights-of-way on tribal land provide utility services on the reservation, or supply energy resources to the utilities which do serve the reservation. This is important because – as shown in Part II – Indian reservations have historically been underserved by utilities, and the grant of energy rights-of-way across tribal lands accordingly provides a potential means for tribes to secure or improve utility service on their reservations. Indeed, we understand that many tribes address right-of-way issues, including compensation, differently when the

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holder of the right-of-way provides service to the reservation. Conversely, when the holder of the right-of-way is simply crossing tribal lands to serve others, the compensation provided for the right-of-way may be the only benefit to the tribe from the right-of-way.

Another issue relevant to the fairness and appropriateness of tribal compensation requires consideration of tribes' taxing and regulatory jurisdiction over right-of-way holders, contrasted to that of other governments, as discussed in Part IIID, *supra*.

Finally, the workplan contemplates establishing different working groups to assist in supplying information to the Departments. While we welcome the opportunity for our Tribal Clients to participate in this open process, we do suggest the Departments ensure that this process complies fully with the Federal Advisory Committee Act, 5 U.S.C. App. 2. If it does, we suggest that the working groups be organized and scheduled in a manner that permits interested entities (such as our Tribal Clients) to participate in multiple working groups.

#### CONCLUSION

We look forward to meeting with you and discussing these issues with you as the study proceeds.

Sincerely,



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Attorneys for the Pueblo of Isleta, the Mandan, Hidatsa and Arikara Nation, the Pueblo of Sandia, the Shoshone-Bannock Tribes and the Pueblo of Zia

#### Enclosure

cc: James E. Cason, Associate Deputy Secretary  
U.S. Department of the Interior  
Kevin M. Kolevar, Director  
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Prior to joining Analysis Group, she was Senior Vice President at Lexecon. She has also served as the Assistant Secretary for Policy at the U.S. Department of Energy, appointed by President Bill Clinton and confirmed by the U.S. Senate. She was also Secretary for Environmental Affairs in Massachusetts under Governor William Weld, and Commissioner at the Massachusetts Department of Public Utilities, to which she was appointed by Governor Michael Dukakis. She was executive director of the Massachusetts Energy Facilities Siting Council. She recently served as chair of the Massachusetts Ocean Management Task Force, appointed by Governor Romney.

Dr. Tierney has authored numerous articles and speaks frequently at industry conferences. She serves on a number of boards of directors and advisory committees, including the National Commission on Energy Policy. She is chairman of the board of the Energy Foundation and the board of Clean Air – Cool Planet; a director of Catalytica Energy Systems Inc., the Northeast States Clean Air Foundation, and the Climate Policy Center; and a member of the Harvard Electric Policy Group, the Massachusetts Renewable Energy Trust Advisory Council, the Environmental Advisory Council of the New York Independent System Operator, and the China Sustainable Energy Program's Policy Advisory Council. She was previously chair of the Electricity Innovations Institute, a director of the Electric Power Research Institute and as a member of the Advisory Council of the New England Independent System Operator. She has taught at the University of California at Irvine, and she earned her Ph.D. and M.A. degrees in regional planning at Cornell University and her B.A. at Scripps College.

## EDUCATION

- 1980            Ph.D. in Regional Planning, Public Policy, Cornell University, Ithaca, NY  
Dissertation: *Congressional policy making on energy policy issues*
- 1976            M.A., in Regional Planning, Public Policy, Cornell University, Ithaca, NY
- 1973            B.A. in Art History, Scripps College, Claremont, CA
- 1971-72        Studied political science, L'Institut d'Etudes Politiques, Paris, France

## PROFESSIONAL EXPERIENCE

- 2003-present    Analysis Group, Inc., Boston, MA  
Managing Principal
- 1999-2003      Lexecon, Inc., Cambridge, MA (formerly The Economics Resource Group, Inc.)  
*Senior Vice President*
- 1995-1999      Economics Resource Group, Inc., Cambridge, MA  
*Principal and Managing Consultant*
- 1993-1995      U.S. Department of Energy, Washington, DC  
*Assistant Secretary for Policy*
- 1991-1993      Commonwealth of Massachusetts, Executive Office of Environmental Affairs, Boston, MA  
*Secretary of Environmental Affairs*
- 1988-19991     Commonwealth of Massachusetts, Department of Public Utilities, Boston, MA  
*Commissioner*
- 1984-1988      Commonwealth of Massachusetts, Energy Facilities Siting Council, Boston, MA  
*Executive Director*
- 1983-1984      Commonwealth of Massachusetts, Executive Office of Energy Resources, Boston, MA  
*Senior Economist*
- 1982-1983      Commonwealth of Massachusetts, Energy Facilities Siting Council, Boston, MA  
*Policy Analyst*
- 1982            National Academy of Sciences, Washington, DC  
*Researcher*
- 1978-1982      University of California at Irvine, Irvine, CA  
*Assistant Professor*

## SELECTED CONSULTING EXPERIENCE

- **Various confidential engagements** involving power sales agreements, gas supply contracts, advisory services on gas and electric matters, and market power and monitoring issues.
- **Major Electric Company**  
Provided analysis of designs of mandatory carbon control policies (2005-present).
- **Electric utility company**  
Performed independent evaluator services in procurement for power resources (2005-present).
- **Power Generation Company**  
Provided analysis of product market development in MidWest and Eastern RTOs (2005).
- **New England Energy Alliance**  
Prepared a white paper on energy infrastructure needs in the New England states. (2005-present)
- **Committee on Regional Electric Power Cooperation (of the Western Interstate Energy Board)**  
Provides research and advising with respect to market monitoring and assessment for the Western wholesale electric markets. (2005-present)
- **Southern California Edison Company**  
Provided Independent Evaluator services for a long-term generation procurement (2005).
- **LNG / Interstate Gas Pipeline project**  
Prepared regional market study for the project (2004-2005).
- **Electric Generating Company**  
In a contract dispute, provided expert witness services relating to whether changes in a region's wholesale power market rules nullified a power sales agreement. (2004-2005)
- **Louisville Gas & Electric and Kentucky Utilities**  
For two vertically integrated electric companies, provided expert witness services in a state investigation of which regional transmission approach satisfies state policy objectives (2004-present).
- **Independent Generating Company**  
For a power company owned by commercial lenders in a Northeast power market, provided consulting services to monitor state regulatory policies and actions with respect to utility regulation and environmental regulation, and legislation affecting power plants. (2004)
- **Major Electric and Gas Company**  
Performed confidential study of the benefits, costs and current conditions in certain wholesale and retail electric power markets. (2004-2005)
- **Regional Transmission Organization**  
For a confidential project, analyzes market monitoring and mitigation approaches (2004-2005).
- **Major Commercial Bank**  
For a confidential project, advise with regard to electric industry restructuring and profitability of large energy marketer and trading organization (2004-2005)
- **Consumer Energy Council of America**  
For a group of electric industry market participants, regulators, and interest groups, prepared white papers on the need for transmission enhancements in U.S. power markets. (2004)

- **Retail electric company**  
Provides confidential analysis of business models and regulation approaches for providing retail electric service in the state (2004).
- **Independent system operator**  
Provided confidential analysis and research on alignment of retail and wholesale market policies (2004).
- **State attorney general**  
Provided expert witness services with regard to state resource adequacy and planning practices (2004).
- **Pacific Gas & Electric Company**  
Provided expert witness services relating to the public benefits of the settlement between PG&E and the California Public Utility Commission, to enable PG&E to emerge from bankruptcy. (2003)
- **Independent power company**  
Provided consulting advice on economics of compliance strategies for air and water permits (2003)
- **Major public utility company**  
Provided expert advisory services to a buyer of power supplies relating to the pricing and other terms for a long-term purchase power agreement. (2003)
- **Duke Power**  
Provided expert advisory services relating to state rate-making and other regulatory practices. (2003)
- **Exelon Generation**  
Provided strategic advice and analytic services relating to market conditions affecting the client's generating assets in New England. (2003)
- **Entergy Services Inc.**  
Provides services as the independent monitor of Entergy's Fall 2002, Spring 2003 and Fall 2003 Requests for Proposals for Supply-Side Resources. (2002-present)
- **Power generation company in New England**  
Provided expert testimony in contract dispute regarding allocation of uplift costs in an agreement concerning the supply of wholesale power for standard offer service. (2002)
- **Connecticut Light and Power Company**  
Provided expert testimony in contract dispute regarding allocation of congestion costs in an agreement concerning the supply of wholesale power for standard offer service. (2002 - 2003)
- **Ocean State Power**  
Provided arbitration services in a dispute regarding a gas purchase contract between Ocean State Power and ProGas Ltd. (2002-2003)
- **Regional independent system operator**  
Provided strategic advice on regional transmission organization strategy. (2002)
- **PJM Interconnection**  
Provided advice to the appointed mediator as part of the Alternative Dispute Resolution process, in a dispute involving PJM and a market participant. (2002)



- **Duke Energy Corporation**  
Provided analysis on strategic issues in gas and electric regulatory policy for Duke Energy's corporate office, including with regard to code of conduct issues, wholesale competition, regional transmission organization policy. (2001-2002)
- **Pacific Gas and Electric Corporation**  
Provided expert witness testimony in proceedings of the Federal Energy Regulatory Commission on public benefits of the proposed restructuring of PG&E assets as part of its emergence from bankruptcy. (2001-2002)
- **Massachusetts Renewables Trust**  
Provided assistance in support of the Trust's renewables and power quality program. (2001-2002)
- **Major electric holding company**  
Prepared an analysis of the regulatory policies for reviewing merger applications in states where potential merger candidates are located. (2001)
- **Western Massachusetts Electric Company**  
Provided expert testimony in contract disputes regarding allocation of congestion costs in agreements concerning the supply of wholesale power for standard offer service. (2001-2002)
- **The Energy Foundation**  
Researched and wrote a white paper on California's process for permitting new power plants. (2001)
- **Cross-Sound Cable Company**  
Provided expert testimony regarding public benefits of proposal to construct merchant transmission facility across Long Island Sound. (2001-2002)
- **Major independent power company**  
Provides expert witness support in litigation surrounding power plant development project, involving viability of project's environmental and siting permitting. (2001 - 2004)
- **MASSPOWER Inc.**  
Mediator in a contract dispute involving pricing of power purchases. (2001)
- **NRG Energy and Dynegy**  
Provided expert witness support in regulatory proceeding to review these companies' acquisition of power plants being divested by Sierra Pacific and Nevada Power. (2001)
- **Occidental Chemical Corporation**  
Provided expert witness support and economic analysis of a major electric utility's transmission policies and practices, and review of the proposed RTO. (2000)
- **PP&L Global**  
Provided economic and environmental analysis and expert witness support for proposal to build the Kings Park Energy power plant in Long Island, New York. (2000)
- **Calpine Corporation**  
Provided economic and environmental analysis and expert witness support for proposal to build the Wawayanda power project in Rockland County, New York (2000)  
  
Provided environmental analysis and expert witness support for proposal to build the Towantic power plant in Oxford, Connecticut. (2001)
- **American National Power, Calpine, El Paso, NRG Energy, Sithe, Southern Energy**  
Provided support for the development of a proposal for a Regional Transmission Organization for New England. (2000 - 2001)

- **Duke Energy/Maritimes and Northeast Pipeline**  
Provided expert reports on the market and environmental impacts of new natural gas infrastructure and supply in New England and the public benefits of the Maritimes and Northeast Phase III and Hubline project. (2000-2003)
- **Arkansas Electric Distribution Cooperatives and Arkansas Electric Cooperative Corporation**  
Provided expert witness support and analysis on economic and public policy issues associated with various aspects of wholesale and retail competition in Arkansas. (2000 - 2001)
- **TransÉnergie U.S.**  
Provided expert testimony regarding public benefits of proposal to construct merchant transmission facility. (2000 - 2001)
- **Conectiv**  
Provided strategic wholesale market analysis and support for procurement of supplies for distribution utility company's provision of Basic Generation Services to retail customers. (2000)
- **SCS Energy Corp. – Astoria Energy**  
Provided economic and environmental analysis and expert witness support for proposal to build new power plant in New York City. (2000 - 2001)
- **HEFA Power Options**  
Provided strategic advice regarding wholesale electricity market for retail buyers' group. (2000-2003)
- **Major real estate development company**  
Provided strategic support for configuration of electric and gas infrastructure for large regional mixed-use development project. (2000 - 2001)
- **Investment company**  
Provided strategic advice to investment company with regard to potential investment in major electric generating equipment manufacturing company. (2000)
- **Major independent power company**  
Provided economic and environmental support for company's application to construct a merchant power plant in Florida. (2000)
- **Major railroad company**  
Provided expert witness support on economic and regulatory policy issues for railroad in state regulatory proceeding on a proposed utility merger. (2000)
- **Coalition of Wireless Telecommunications Carriers**  
Prepared an expert report on economic benefits of wireless telecommunications. (2000)
- **Major brownfield property developer**  
Provided economic valuation of property to be developed as site for new electric generating facility. (2000)
- **Fitchburg Gas and Electric Company**  
Provided litigation support for a gas and electric company on rate design policy. (2000)
- **Consortium of electric companies**  
Provided economic analysis, contract review, and litigation support for a consortium of electric companies with power purchase agreements with PURPA projects. (1999)
- **FirstEnergy Corp.**  
Provided expert witness support regarding generation asset valuation and the impacts of a new electric industry restructuring law on the company. (1999 - 2000)

- **Ozone Attainment Coalition**  
Provided strategic analysis and advice on electric system reliability issues relating to electric companies' implementation of 2003 NOx requirements issued by the U.S. EPA. (1999)
- **Municipal electric department**  
Provided expert witness services and analysis of the economics and need for a new natural gas pipeline proposed to serve an existing electric power plant in Massachusetts. (1998 - 2001)
- **Seneca Nation**  
Provided expert analysis and strategic advice regarding the value of transmission rights of way, in a dispute with an electric utility company. (1998 - 2000)
- **Major cable company**  
Provided strategic advice in a series of regulatory and court cases involving inter-affiliate transactions of an electric utility company entering into competitive telecommunications and cable markets. (1998)
- **Major electric utility company**  
Provided expert witness support regarding structural changes in the electric industry, in litigation pertaining to the company's restructuring plans. (1998 - 1999)
- **Sithe Energies, Inc.**  
Provided strategic advice and regulatory support on a variety of issues (market analysis, transmission and ISO issues, federal and state market rules, legislation, siting, environmental strategy) relating to the company's participation in the New England, New York, and PJM markets. (1997 to 2003)  
Provided transition assistance to the company in its acquisition and integration of approximately 2,000-megawatts of existing fossil fuel generation from Boston Edison Company. (1997 - 1998)  
Provided transition assistance to the company in its acquisition and integration of approximately 4,100-megawatts of existing fossil and hydroelectric generation capacity from GPU Genco. (1998 - 1999)  
Provided support for the company's participation in electricity product markets structured by NEPOOL and operated by the Independent System Operator-New England, the New York power pool and the New York ISO, and PJM. (1997 to 2002)  
Provided strategic project development advice and expert witness support for the company's applications to construct three natural gas merchant power plants (totalling 2865 megawatts) in Everett, Weymouth, and Medway, Massachusetts. (1998 to 2001)  
Provided strategic guidance and regulatory support regarding design of air quality improvement plan for existing fossil units at Mystic Station. (1998 to 2001)  
Provided strategic guidance regarding company's natural gas-fired merchant power plant development projects in Ontario, Canada. (2000 to 2001)
- **Various private electric companies, state legislative committees, gas companies, electric asset investor groups**  
Provided workshops and presentations on changes under way in the electric industry, with focus on issues of strategic importance to these particular decision-makers and stakeholders. (1995 - present)
- **Natural Resources Canada**  
Prepared a white paper on the implications for electric system reliability in Canada that are associated with restructuring the electric industry in the United States. (1999)
- **Cummins Engine Company, Inc.**  
Provided strategic analysis on implications of national energy and environmental policies for the Company's long-term business opportunities. (1999)

- **Electric utility company**  
Provided advice and regulatory support with regard to the economics and prudence of an existing long-term power purchase agreement. (1998)
- **National Association of Regulatory Utility Commissioners**  
Assisted the Executive Director and NARUC leadership in updating its strategic plan and in preparing a business plan for its implementation. (1998)
- **State energy office**  
Assisted the office in analyzing options for supporting renewable resource development in the state and in designing a market-based strategy to implement a new legislative mandate for a “renewables portfolio standard.” (1997-1998)
- **U.S. Generating Company (now PG&E Generating Company)**  
Provided analysis of the economic, reliability, and environmental benefits to the host state and region of a new merchant power generation facility: the 360-megawatt Millennium project in Massachusetts. Provided expert witness testimony on the results of this analysis to the Massachusetts Energy Facility Siting Board. (1996-1997)  
  
Provided analysis of the economic, reliability, and environmental benefits of a new merchant power generation facility: the 792-megawatt Lake Road Generating Project in Connecticut. Provided expert witness testimony on the need for this project to the Connecticut Siting Board. (1997-1998)
- **Pennsylvania Power & Light Company**  
Provided strategic guidance, economic and policy analysis, and regulatory support for electric utility company as it developed and proposed its plan for restructuring its company for retail competition. Issues and tasks included electricity market price estimation, rate design, revenue analysis, consumer protection, corporate structure, and regulatory strategy. Provided expert witness testimony on rate design policy issues. (1996-1998)
- **Major diversified electric equipment company**  
Provided strategic advice and analysis on market opportunities and risk in various regions of the U.S. electric industry, under numerous restructuring scenarios. (1996-1997)
- **Major nationwide electricity consumer**  
Conducted analysis of buying options and strategies for acquisition of electricity services in states with customer choice in retail generation markets. Analysis included review and comparison of eight states’ implementation of customer choice, from the perspective of how retail rate and function are unbundled, how the commercial and reliability functions are structured in the regional generation market, and how the customer should approach the market to competitively procure power across various states. (1997)
- **National Council on Competition in the Electric Industry**  
Prepared a Briefing Paper on Regional Issues in Electric Industry Restructuring, for the NCCEI—a joint project of the National Association of Regulatory Utility Commissioners, the National Conference of State Legislatures, the U.S. Department of Energy, and the U.S. Environmental Protection Agency. Analyzed regional issues, including electric system reliability, transmission access and siting, environmental protection, market power, interstate reciprocity in retail access policies, and regulation of multi-state electric utility companies. (1997)
- **Major western coal company**  
Analysis of western states’ electric industry restructuring policies and market prices for power in various states within the Western Systems Coordinating Council area. (1996-1997)

- **Major gas pipeline company**  
Provided analysis of market structures and prices for generation and delivery services in electric service territories where the gas pipeline would locate facilities that use electricity. (1997)
- **Major electric supply company**  
Provided analysis of regional electricity market conditions to support this company's analysis of the value of various utility assets that were being divested as part of an electric utility company's corporate restructuring. (1997)
- **Massachusetts Division of Energy Resources**  
Analyzed Boston Gas Company's proposal for unbundling its retail service, its proposal for performance-based rates, and its plan for departing the merchant function. Provided analytic, policy and negotiation support on gas industry restructuring issues in a variety of cases. (1996-1998)
- **Massachusetts Division of Energy Resources**  
Assisted the state's energy office in developing policies for establishing and implementing a statewide fund to support renewable resource development as part of the state's electric industry restructuring plan. Provided analytic support to the energy office as it participated in a working group of stakeholders attempting to reach consensus on the institutional design of such a renewables fund. Drafted legislative language to create the fund and the non-bypassable charge on electric distribution service in the state. (1997)
- **Massachusetts Water Resources Authority Advisory Board**  
Analyzed opportunities for the MWRA, a public authority with major energy-using and -producing assets, to position itself beneficially as a participant in a restructured retail electricity market in New England. (1996-1997)
- **Coalition of marketers and independent power producers**  
Analyzed a state public utility commission's proposed rules for restructuring the electric industry, from the point of view of whether the proposed structure would assure a workably competitive market. Examined the regional power pool's proposal for an independent system operator. (1996-1997)
- **Major independent power producer**  
Analyzed market opportunities and risks for merchant plant development in a region of the U.S. (1996)
- **Major independent power producer**  
Analyzed the expected market price of power in two regions of the U.S. electricity markets. Presented results to company board of directors. (1996)
- **MCI, Inc.**  
Provided strategic regulatory advice in local competition proceeding before a state public utility commission. Provided testimony on local competition policy issues in public utility commission proceedings in Massachusetts and New York. (1996)
- **Group of municipal electric companies in New York State**  
Provided expert witness testimony on cost allocation issues in court litigation on wholesale power contracts. (1996)
- **Intercontinental Energy Corporation**  
Provided strategic guidance, analytic support, and regulatory support for the company, a major independent power producer, as it developed its position in the state's electric industry restructuring proceeding. Issues involved regional industry structure (including independent system operator proposals), stranded cost recovery policy, stranded cost calculation methodologies, horizontal and

vertical market power issues, environmental protection, and securitization. Provided expert witness testimony in state retail restructuring proceedings in Massachusetts and New Jersey. (1995-1997)

- **Nextel Communications**

Provided economic and policy analysis on barriers to entry in the local commercial mobile radio service market in region. Provided expert witness testimony before the Massachusetts Department of Public Utilities. (1995-1998)

- **Arizona Public Service Company**

Provided expert witness testimony on regulatory reforms necessary to align traditional existing utility planning proceedings with competitive retail markets as being proposed in the state. (1995)

## TESTIMONY ON BEHALF OF CLIENTS

- **Several confidential expert reports, testimonies, declarations, affidavits, and depositions in confidential arbitrations and mediations.**

- **Louisville Gas & Electric Company and Kentucky Utilities Company**

Before the *Kentucky Public Service Commission*, Application of LG&E and KU to transfer functional control of their transmission assets, Case No. 2005-xxxx, Direct Testimony, November 19, 2005.

- **Western Massachusetts Electric Company**

Before the Superior Court Department of Norfolk County, Massachusetts, *Alternative Power Source, Inc., v. Western Massachusetts Electric Company*, Civil Action No. 00-1967, on the allocation of costs related to transmission congestion in wholesale power contract for standard offer service. Expert Report, September 19, 2001; deposition, October 15, 2001; testimony at trial, July 15, 2005.

- **Entergy Louisiana, Inc. and Entergy Gulf States Inc.**

Before the *Louisiana Public Service Commission*, Application of Entergy Louisiana, Inc. for Approval of the Purchase of Electric Generating Facilities and Entergy Gulf States, Inc. for Authority to Participate in Contract for the Purchase of Capacity and Electric Power, Docket No. U27836, January 21, 2005.

- **Louisville Gas & Electric Company and Kentucky Utilities Company**

Before the *Kentucky Public Service Commission*, Investigation Into The Membership of Louisville Gas and Electric Company and Kentucky Utilities Company In The Midwest Independent Transmission System Operator, Inc., Case No. 2003-00266, September 29, 2004; Supplemental Rebuttal Testimony, January 10, 2005; testimony at hearing, June 2005.

- **Entergy Services Inc.**

Before the *Federal Energy Regulatory Commission*, Entergy Services Inc., et al., in support of the application for approval of market-based power purchase agreements under Section 205 of the Federal Power Act. Affidavit, February 28, 2003; Affidavit, March 31, 2003; Testimony, September 2003; Testimony at deposition, November 20, 2003; Rebuttal Testimony, May 11, 2004; Deposition, May 27, 2004, and June 10-11, 2004; Testimony under cross-examination, July 19-23, 26-27, 2004.

- **Pacific Gas & Electric Company**

Before the *California Public Utilities Commission*, In Re: Order Instituting Investigation into the ratemaking implications for Pacific Gas and Electric Company (PG&E) pursuant to the Commission's Alternative Plan of Reorganization under Chapter 11 of the Bankruptcy Code for PG&E, in the United States Bankruptcy Court, Northern District of California, San Francisco Division, In re Pacific Gas and Electric Company, Investigation 02-04-026, Pre-Filed Testimony, July 23, 2003, Testimony under cross-examination, September 12, 2003.

- **Entergy Louisiana, Inc.**  
Before the *Louisiana Public Service Commission, Entergy Service*, In Re: Application of Entergy Louisiana, Inc., for Authorization to Enter into Certain Contracts for the Purchase of Capacity and Energy, Docket No. U-27136, Rebuttal Testimony, April 25, 2003.
- **Pacific Gas and Electric Company/PG&E Corporation**  
Before the *Federal United States Bankruptcy Court, Northern District of California, San Francisco Division*, In Re: Pacific Gas and Electric Company, Debtor, Federal I.D. No. 94-0742640, on the public policy concerns raised by the proposed reorganization plan of PG&E Corporation. Expert report, November 8, 2002; rebuttal report, November 26, 2002.
- **PP&L Global**  
Before the *New York Public Service Commission, Article X Siting Board*, on the economic and environmental benefits of the Kings Park Energy power plant. Prefiled direct testimony (with James Potter, Stephen T. Marron, David J. Kettler, and Thomas Conoscenti), January 2002; rebuttal testimony (with James Potter, Stephen T. Marron, William C. Miller, Jr., N. Dennis Eryou, and Robert W. Brown), October 23, 2002.
- **Connecticut Light & Power Company**  
Before the *Federal United States District Court, District of Connecticut, Connecticut Light & Power Company v. NRG Power Marketing Inc.*, on their standard offer service wholesale sales agreement. Expert report, August 30, 2002; deposition, September 27, 2002.
- **Pacific Gas and Electric Company/PG&E Corporation**  
Before the *Federal Energy Regulatory Commission, in the Matter of Pacific Gas and Electric Company, PG&E Corporation, on behalf of its Subsidiaries Electric Generation LLC, ETrans LLC, and GTrans LLC*, on the public benefits of the application seeking approval under Section 203 of the Federal Power Act and Section 12 of the Natural Gas Act for various actions relating to restructuring of the company to emerge from bankruptcy, November 30, 2001.
- **Cross-Sound Cable Company LLC**  
Before the *Connecticut Siting Council*, on the public benefits of the proposed Cross Sound Cable Project's *Application for a Certificate of Environmental Compatibility and Public Need*, Docket No. 208. Prepared direct testimony, July 23, 2001; oral testimony under cross-examination, October 24-26, 29-30, 2001.
- **Sithe New England (Sithe Edgar LLC, Sithe New Boston LLC, Sithe Framingham LLC, Sithe West Medway LLC, Sithe Mystic LLC)**  
Before the *Federal Energy Regulatory Commission, in the Matter of NSTAR Electric & Gas Corp., v. Sithe Edgar LLC, Sithe New Boston LLC, Sithe Framingham LLC, Sithe West Medway LLC, Sithe Mystic LLC, and PG&E Energy Trading*, Docket No. EL01-79-000. Affidavit comparing historical cost recovery by Boston Edison for its portfolio of fossil generation units (pre-divestiture) under rate regulation, versus Sithe's revenue recovery for these same units (post-divestiture) under market prices, June 5, 2001.
- **NRG Energy Inc. and Dynegy Holdings Inc.**  
Before the *Public Utilities Commission of Nevada*, In Re: petition of the Attorney General's Bureau of Consumer Protection to issue an Order staying further proceedings regarding divestiture of Nevada's electric generation assets and to open a docket to consider whether to issue a moratorium on divestiture in Nevada. Supplemental prepared direct testimony on behalf of Valmy Power LLC, April 6, 2001; testimony under cross-examination.  
  
Before the *Public Utilities Commission of Nevada*, In Re: petition of the Attorney General's Bureau of Consumer Protection to issue an Order staying further proceedings regarding divestiture of

Nevada's electric generation assets and to open a docket to consider whether to issue a moratorium on divestiture in Nevada, prepared direct testimony on behalf of Reid Gardner Power LLC and Clark Power LLC, April 3, 2001; testimony under cross-examination.

- **Sithe New England, LLC**  
Before the *Federal Energy Regulatory Commission, In the Matter of Maine Public Utilities Commission and The United Illuminating Company v. ISO New England, Inc.*, affidavit on the role of price "spikes" in compensating generators for the services that they provide in the region, September 7, 2000.
- **Arkansas Electric Distribution Cooperatives**  
Before the *Arkansas Public Service Commission, In the Matter of a Generic Proceeding to Establish Uniform Policies and Guidelines for a Standard Service Package*. Prepared joint reply testimony (with Janet Gail Besser), July 21, 2000; prepared joint surreply testimony (with Janet Gail Besser), August 3, 2000.
- **TransEnergie U.S.**  
Before the *Connecticut Siting Council*, on the public benefits of the proposed Cross Sound Cable Project. Expert report, July, 2000; prepared direct testimony, September 20, 2000; oral testimony, September 27, 2000; supplemental written testimony, December 7, 2000; oral testimony under cross-examination, December 14, 2000; oral testimony January 9-11, 2001.
- **SCS Energy Corp.**  
Before the *New York State Public Service Commission*, on the economic and environmental impact of a new combined cycle power plant in Queens, NY, June 19, 2000.
- **Reading Municipal Light Department**  
Before the *Massachusetts Energy Facilities Siting Board, Docket No. EFSB 97-4*, on the economics and need for a new natural gas pipeline, June 19, 2000; testimony under cross-examination September 19, 2000, September 21-22, 2000, October 5, 2000, and October 17, 2000.
- **Fitchburg Gas and Electric Light Company**  
Before the *Massachusetts Department of Telecommunications and Energy, Docket D.T.E. 99-66*, on gas and electric company rate design policy, testimony under cross-examination, January 14, 2000.
- **FirstEnergy Corp.**  
Before the *Public Utilities Commission of Ohio, In the Matter of the Application of FirstEnergy Corp. on behalf of Ohio Edison Company, the Toledo Edison Company, and The Cleveland Electric Illuminating Company: for Approval of an Electric Transition Plan and for Authorization to Recover Transition Revenues (Case No. 99-1212-EL-ETP); for Approval of New Tariffs (Case No. 99-1213-EL-ATA); for Certain Accounting Authority (Case No. 99-1214-EL-AAM)*, on recovery of transition costs and calculation of the market value of generation assets. Joint testimony (with Dr. Scott T. Jones), December 22, 1999; supplemental testimony (with Dr. Scott T. Jones), April 4, 2000; deposition, April 7, 2000.
- **Sithe New England, LLC**  
Before the *Massachusetts Energy Facilities Siting Board, Docket EFSB 98-10*, in support of an application to construct a 540 MW gas-fired single cycle peaking power plant in Medway, Massachusetts. Prepared direct testimony, April 1999; oral testimony under cross-examination, July 27, 1999.



- **Village of Bergen, et al.**

Before the *Supreme Court of the State of New York*, Index No. 081556, Affidavit in Response to Defendant's Submission of February 25, 1999, in *Village of Bergen, et al., Plaintiffs, v. Power Authority of the State of New York, Defendant*, March 3, 1999.

Before the *Supreme Court of the State of New York*, Index No. 081556, Affidavit in Support of Petition to Correct Rates, in *Village of Bergen, et al., Plaintiffs, v. Power Authority of the State of New York, Defendant*, October 17, 1996.

- **Sithe New England, LLC**

Before the *Massachusetts Energy Facilities Siting Board*, Docket EFSB 98-7, in support of an application to construct a 750 MW gas-fired combined cycle power plant at the Fore River Station in Weymouth, Massachusetts (Edgar). Prepared direct testimony, February 10, 1999; oral testimony under cross-examination, July 26, 1999.

- **Sithe New England, LLC**

Before the *Massachusetts Energy Facilities Siting Board*, Docket EFSB 98-8, in support of an application to construct a 1500 MW gas-fired combined cycle power plant at the Mystic Station in Everett, Massachusetts. Prepared direct testimony, February 10, 1999; oral testimony under cross-examination, May 25, June 2, 1999.

- **U.S. Generating Company**

Before the *Connecticut Siting Board*, Docket No. 189, on an application to construct a new Lake Road Generating Project, September 1998. Oral testimony under cross-examination.

- **Central Hudson Gas & Electric Corporation**

Before the *Supreme Court of New York*, Index No. 255/1998, *CHGE v. West Delaware Hydro Associates*, on issues relating to ratemaking treatment of costs relating to power contracts, April 13, 1998.

- **Sithe New England Holdings, LLC**

Before the *Massachusetts Department of Telecommunications and Energy and the Massachusetts Energy Facilities Siting Board*, Docket Nos. DTE98-84 and EFSB98-5, on issues pertinent to forecast and supply planning by electric companies, September 14, 1998.

- **Sithe Energies, Inc.**

Before the *Massachusetts Energy Facilities Siting Board*, Docket No. EFSB98-3, on issues related to the agency's rulemaking establishing a Technology Performance Standard, June 8, 1998.

Before the *Massachusetts Energy Facilities Siting Board*, Docket No. EFSB98-1, on issues related to the agency's review of project viability as part of its review of power plant applications, March 16, 1998.

- **Pennsylvania Power & Light**

Rebuttal testimony on codes of conduct governing affiliate relations. *Pennsylvania Public Utility Commission*, Docket Nos. A-122050F0003, A-120650F0006, testimony under cross-examination, February 17, 1998.

Rebuttal testimony on rate unbundling and rate design issues, on consumer protection issues. *Pennsylvania Public Utility Commission*, Docket No. R-00973954, testimony under cross-examination, August 5, 1997.

Before the *Pennsylvania Public Utility Commission*, Docket No. R-00973954, on rate design, April 1, 1997.

- **Nextel Communications**  
Before the *Massachusetts Department of Public Utilities, Docket 95-59-B*, on telecommunications facility matters, testimony under cross-examination, January 1997.
- **Arizona Public Service Company**  
Before the *Arizona Corporation Commission, Docket No. U-0000-95-506*, on integrated resource planning and competition, October 1996.
- **U.S. Generating Company**  
Before the *Massachusetts Energy Facilities Siting Board, Docket 96-4*, on an application to construct a new Millennium power generating facility, testimony under cross-examination, October 1996.
- **MCI Communications, Inc.**  
Before the *Massachusetts Department of Public Utilities*, in the NYNEX interconnection docket. Opening up the Local Exchange Market to Competition: Common Themes with Retail Competition in Electricity and Natural Gas Industries, August 30, 1996.
- **Intercontinental Energy Corporation**  
Before the *New Jersey Board of Public Utilities, No. EX94120585Y*, on the Energy Master Plan Phase I Proceeding to Investigate the Future Structure of the Electric Power Industry, July 1996.  
Before the *Massachusetts Department of Public Utilities, DPU 96-100*, on the Investigation Commencing a Notice of Inquiry/Rulemaking for Electric Industry Restructuring Proceedings, July 1996.

## PUBLICATIONS, REPORTS, ARTICLES

Several confidential reports prepared for clients.

“New England Energy Infrastructure – Adequacy Assessment and Policy Review,” White Paper prepared for the New England Energy Alliance; co-authored with Paul J. Hibbard November 2005.

“New energy bill doesn’t do enough.” Op Ed, *Boston Globe*, July 29, 2005.

“The Benefits of New LNG Infrastructure in Massachusetts and New England: The Northeast Gateway Project,” Prepared for Northeast Gateway Energy Bridge, L.L.C., and Algonquin Gas Transmission, LLC, White Paper co-authored with Paul. J. Hibbard, June 2005.

“Principles for Market Monitoring and Mitigation in PJM: A Review of Economic Principles, Legal and Regulatory Structures, and Practices of Other Regions, with Recommendations,” White Paper prepared for PJM Interconnection, January 3, 2005.

“Keeping the Power Flowing: Ensuring a Strong Transmission System to Support Consumer Needs For Cost-Effectiveness, Security and Reliability – A Report of the Transmission Infrastructure Forum of the Consumer Energy Council of America,” co-authored the report with CECA staff for this CECA Transmission Infrastructure Forum, January 2005.

Signatory to “Ending the Energy Stalemate: A Bipartisan Strategy to Meet America’s Energy Challenges, Summary of Recommendations,” Washington, DC: National Commission on Energy Policy, December 2004.

“Comments of Susan F. Tierney and Paul. J. Hibbard on their own behalf,” before the *Federal Energy Regulatory Commission, in the Matters of Solicitation Processes for Public Utilities (Docket No. PL04-6-000) and Acquisition and Disposition of Merchant Generation Assets by Public Utilities (Docket No.*

PL04-9-000), on the role of independent monitors and independent evaluators in public utility resource solicitations, July 1, 2004.

“Energy and Environmental Policy in the United States: Synergies and Challenges in the Electric Industry” (with Paul J. Hibbard), prepared for Le Centre Français sur les Etats-Unis (The French Center on the United States), July 2003; presentation in Paris, October, 2003.

“Supplemental Report on the Benefits of New Gas Infrastructure in New England: The Everett Extension Project” (with Charles Augustine), prepared for Algonquin Gas Transmission Company, February 5, 2003.

“The Political Economy of Long-Term Generation Adequacy: Why an ICAP Mechanism Is Needed as Part of Standard Market Design” (with Janet Gail Besser and John Farr), *The Electricity Journal*, August/September 2002.

“Siting Power Plants in the New Electric Industry Structure: Lessons California and Best Practices for Other States” (with Paul J. Hibbard), *The Electricity Journal*, June 2002.

“Maritimes Phase III and Algonquin Hubline: ‘Coastal Dependency’ ” *CZM Consistency Review*, May 2002.

“Siting Power Plants: Recent Experience in California and Best Practices in Other States” (with Paul J. Hibbard), prepared for The Hewlett Foundation and The Energy Foundation, February 2002.

“Economic and Environmental Benefits of the Kings Park Energy Project: System Production Modeling Report” (with Joseph Cavicchi), prepared for PPL Global, January 25, 2002.

“The Benefits of New Gas Infrastructure in New England: The Maritimes & Northeast Phase IV Pipeline Project” (with Charles Augustine), prepared for Maritimes & Northeast Pipeline, LLC, January 2002.

“Activating Ontario’s Capacity Market: Design and Implementation Issues” (with Janet Gail Besser and John Farr), prepared for Sithe Energies, Inc., October 24, 2001.

White paper on “Ensuring Sufficient Capacity Reserves in Today’s Energy Markets” (with Janet Gail Besser and John Farr), prepared for submission as part of comments filed by Sithe Power Marketing LLC, Sithe New England Holdings, and FPL Energy LLC, in FERC Docket No. EX01-1-000, October 17, 2001.

“The Rationale and Need for Capacity Obligations and a Capacity Market in a Restructured Ontario Electricity Industry” (with Janet Gail Besser and John Farr), prepared for Sithe Energies, Inc., September 27, 2001.

“Economic and Environmental Benefits of the Wawayanda Energy Center: System Production Modeling Report” (with Joseph Cavicchi), prepared for Wawayanda Energy Center, LLC, August 24, 2001.

“A Better CO<sub>2</sub> Rule,” op-ed, *The New York Times*, May 16, 2001.

“Air Pollution Reductions Resulting from the Kings Park Energy Project” (with Joseph Cavicchi), prepared for PPL Global, January 24, 2001.

“Report on “Economic Benefits of Wireless Telecommunications,” prepared on behalf of the New Hampshire Coalition of Wireless Carriers for the New Hampshire HB 733 Study Committee, November 13, 2000.

Expert Report: “Public Benefits of the Proposed Cross Sound Cable Project Prepared for TransÉnergie U.S. Ltd.,” July 2000.

“The Benefits of New Gas Infrastructure in Massachusetts and New England: The Maritimes & Northeast Phase III Pipeline and the Algonquin Gas Transmission Company HubLine Projects” (with Wayne Oliver of Navigant Consulting), prepared for Maritimes & Northeast Pipeline, LLC and Algonquin Gas Transmission Company, October 2000.

“Production Modeling for the Astoria Project: Report on Results” (with John G. Farr), report for SCS Energy Corp., June 14, 2000.

“Observations from Across the Border: Implications for Canadian Reliability of Recent Changes in U.S. Electricity Markets and Policy,” white paper for Natural Resources Canada, 1999.

“Research Support for the Power Industry” (with M. Granger Morgan), *Issues in Science and Technology*, Fall 1998.

“Maintaining Reliability in a Competitive U.S. Electricity Industry,” Final Report of the Task Force on Electric System Reliability, U.S. Department of Energy, September 29, 1998.

“Regional Issues in Restructuring the Electric Industry,” *The Electricity Industry Briefing Papers*, The National Council on Competition and the Electric Industry, April 1998.

“Fueling the Future: America’s Automotive Alternatives” (with Philip Sharp), The American Assembly, Columbia University, Arden House, NY, September, 1995.

“Needed: Broad Perspective, Fresh Ideas,” guest editorial, *The Electricity Journal*, November 1994.

Foreword in J. Raab, *Using Consensus Building to Improve Utility Regulation*, American Council for an Energy-Efficient Economy, Washington, DC, 1994

“Massachusetts’ Pre-Approval Approach to Prudence in Massachusetts,” *The Electricity Journal*, December 1990.

“Using Existing Tools to Pry Open Transmission—A New England Proposal,” *The Electricity Journal*, April 1990.

“Sustainable Energy Strategy: Clean and Secure Energy for a Competitive Economy” (directed), National Energy Policy Plan, July 1995.

“The Domestic Natural Gas and Oil Initiative: First Annual Progress Report” (directed), U.S. Department of Energy, February 1995.

General Guidelines for Voluntary Reporting of Greenhouse Gases under Section 1605(b) of the Energy Policy Act of 1992 (directed), U.S. Department of Energy, October 1994.

“Fueling a Competitive Economy: Strategic Plan for the U.S. Department of Energy” (directed), April 1994.

“The Domestic Natural Gas and Oil Initiative: Energy Leadership in the World Economy” (directed), U.S. Department of Energy, December 1993.

“Siting Needs: Issues and Options,” U.S. Department of Energy, June 1993.

“The Nuclear Waste Controversy,” in D. Nelkin, *Controversy: The Politics of Technical Decisions*, Sage, 1977; 1984 (second edition).

*DATAWARES: Computer Models in the Federal Government* (with Kenneth L. Kraemer, Siegfried Dickhoven, and John Leslie King), Columbia University Press, 1987.

“The Evolution of the Nuclear Debate: The Role of Public Participation,” *Annual Review of Energy*, 1978.

## **OTHER PROFESSIONAL ACTIVITIES**

Member, National Academy of Sciences Committee on Enhancing the Robustness and Resilience of Electrical Transmission and Distribution in the United States to Terrorist Attack, 2005-present

Advisory Council member, New England Energy Alliance, 2005-present

Director, Electric Power Research Institute, 1998 to 2003, 2005-present

Chair of the Laboratory Direction’s Division Review Panel for the Environmental Energy Technologies Division, Lawrence Berkeley National Laboratory, 2005.

Member, New York Independent System Operator, Environmental Advisory Council, 2004-present.

Chair, Ocean Management Task Force to the Massachusetts Secretary of Environmental Affairs, 2003-2004.

Member, National Commission on Energy Policy, 2002 to present. Final Report: *Ending the Energy Stalemate – A Bipartisan Strategy to Meet America’s Energy Challenges*, December 8, 2004.

Member, Board of Directors, Catalytica Energy Systems Inc., 2001 to present

Co-Chair, RTO Futures: Regional Power Working Group, 2001-2002

Member, Advisory Committee, Carnegie Mellon Electricity Industry Center, 2001 to present

Member, Board of Directors, Climate Policy Center (formerly, Americans for Equitable Climate Solutions (SkyTrust)), 2001 to present

Chair, Board of Directors, Electricity Innovations Institute, 2002 to November 2004; Director, 2001 to 2002.

Member, Florida Energy 2020 Study Commission, Environmental Technical Advisory Committee, 2001

Chair of the Board of Directors, The Energy Foundation, 2000 to present; Vice-Chair, 1999-2000; Director, 1997 to present

Chair of the Board of Directors, Clean Air–Cool Planet: A Northeast Alliance, 2004 to present; director, 1999-2004; Chairman of the Board, 2004 to present.

Member, Policy Advisory Committee, China Sustainable Energy Project–A Joint Project of The Packard Foundation and The Energy Foundation, 1999 to present

Advisory Council member, Clean Air Task Force, 2002 to present

Director, NorthEast States Center for a Clean Air Future (formerly, Northeast States Clean Air Foundation), 1998 to present

Technical Advisor, Mid-Atlantic Area Council/PJM, Dispute Resolution Procedure, 1998 to present

Member, “ISO-New England” (Independent System Operator) Advisory Committee, 1998 to 2003

Director, The Randers Group (subsidiary of Thermo TERRATEK), 1997 - 2000

Director, MHI, Inc. (electric utility aggregator for non-profit organizations in Massachusetts), 1997 - 1999

Director, Thermo ECOTEK Corporation, 1996 - 1999

Member, United States Department of Energy, Electricity Reliability Task Force, 1996-1998

Member, Harvard Electricity Policy Group, 1993 to present

## **HONORS AND AWARDS**

Distinguished Alumna Award, Scripps College, Claremont, CA, 1998

Award for Individual Leadership in Public Service, *The Energy Daily*, 1995

Special Recognition Award for Outstanding Contribution to the Industry, Cogeneration and Competitive Power Institute, Association of Energy Engineers, 1994

Leadership Award, National Association of State Energy Officials, 1994

Commencement Speaker and Honorary Doctorate of Laws, Regis College, Weston, MA, 1992.